

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WALLACE WHEELER,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 269790

Calhoun Circuit Court

LC No. 2005-003530-FC

Before: Fitzgerald, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to rob while armed, MCL 750.89, and was sentenced as a fourth habitual offender, MCL 769.12, to twenty to sixty years’ imprisonment. We affirm.

Defendant argues on appeal that the evidence was insufficient to show that the victim reasonably believed he was confronted with a real weapon and that defendant therefore should have been convicted of the lesser offense of assault with intent to rob while unarmed.

This Court reviews a claim of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We determine if it is supported by sufficient evidence by “view[ing] the evidence in a light most favorable to the prosecution and determin[ing] whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

“The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant’s being armed Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal.” *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). The statute provides that the “armed” element is satisfied by proof that the offender has either “a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon.” MCL 750.89. However, a victim’s subjective belief that a weapon exists is insufficient to support the “armed” element. *People v James Banks*, 454 Mich 469, 472; 563

NW2d 200 (1997). There must be objective evidence that the defendant possessed a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon. *Id.* at 480-481. As our Supreme Court observed in the context of the same language in the armed robbery statute:

The typical armed robbery case prosecuted under the feigned weapon method involves either the use of a toy gun or a finger or other object hidden in a bag or under a coat to simulate the appearance of a weapon together with threatening behavior and statements indicating the existence of a weapon. *The existence of some object, whether actually seen or obscured by clothing or something such as a paper bag, is objective evidence that a defendant possesses a dangerous weapon or an article used or fashioned to look like one.* Related threats, whether verbal or gesticulatory, further support the existence of a weapon or article. [*People v Jolly*, 442 Mich 458, 469-470; 502 NW2d 177 (1993) (emphasis added; footnotes omitted).]

The crime of which defendant was charged and convicted is *assault with intent* to commit robbery while armed, MCL 750.89, not armed robbery. The primary elements are an assault and the requisite specific intent. *Cotton, supra*, 391. Defendant confronted the victim with what appeared to the victim to be a .45 automatic handgun. Defendant shoved the gun into the victim's ribs and demanded all of his money. Defendant's forcible touching accompanied by threats constituted an assault. *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979) ("a simple criminal assault 'is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.' " Quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 [1978]).

The victim testified that he was terrified and scared because he thought defendant had a real gun. Because he thought the gun was real, he started to comply with defendant's demand that he surrender all his money. Defendant's acts of brandishing an apparent handgun and demanding all of the victim's money sufficed to establish his intent to rob. At that point the crime was complete. Considered in a light most favorable to the prosecution, the evidence showed an assault with intent to rob while armed with an "article used or fashioned in a manner to lead [the victim] so assaulted reasonably to believe it to be a dangerous weapon." MCL 750.89. The prosecutor did not have to prove that defendant actually obtained the victim's money.

It was only when defendant stepped back away from the taxicab and into the light, removed the gun from the victim's ribs, and pointed it at his face that the victim was able to see that the barrel of the gun was capped or plugged. At that point, the victim realized the gun was a toy. Another witness and the police officer who arrested defendant agreed that the gun looked real. Hence, the gun was "used or fashioned in a manner to lead [the victim] . . . reasonably to believe [that it was] a dangerous weapon." MCL 750.89. The display of this weapon and the fact that it was shoved into the victim's ribs, while accompanied by demands that the victim surrender his money, was objective evidence that defendant possessed an article used or fashioned to look like a dangerous weapon with the specific intent to rob or steal. *Jolly, supra* at 469-470.

The evidence was therefore sufficient to establish defendant's guilt of assault with intent to commit robbery while armed.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Peter D. O'Connell